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No. 92-273

In the Supreme Court of the United States

OCTOBER TERM, 1992

CALVIN A. ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military to serve as court-martial trial judges.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-9a, is reported at 34 M.J. 228. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 10a-18a, is not officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on May 15, 1992. The petition for a writ of certiorari was filed on August 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Navy, was convicted by a military judge of one count of attempted rape, one count of forcible sodomy, one count of assault with intent to inflict grievous bodily harm, one count of larceny, and one count of indecent assault, in violation of Articles 80, 121, 125, 128, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 921, 925, 928, and 934, respectively. The trial judge sentenced petitioner to confinement for 45 years, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank. The convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. 860, and approved the findings and sentence. The Navy-Marine Corps Court of Military Review reversed petitioner's conviction for attempted rape, but affirmed his other convictions. It reduced the confinement term of petitioner's sentence to 30 years, but affirmed the remaining aspects of petitioner's sentence. The Court of Military Appeals granted discretionary review and affirmed.

ARGUMENT

Petitioner maintains that the military trial judge was not qualified to hold that position because he was appointed to it by the Judge Advocate General of the Navy in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. That claim does not warrant review by this Court, for several reasons.

First, petitioner has not properly preserved his claim for review by this Court. Petitioner did not raise this contention at or before trial and therefore has waived his claim under the rules of military procedure. See Rule for Courts-Martial 905(e), *Manual for Courts-Martial, United States—1984*, at II-109.[1] Petitioner also did not

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[1] Rule 905(e) provides as follows:

raise this claim in the court of military review or in the Court of Military Appeals, and neither court addressed petitioner's contention. Petitioner therefore cannot raise that claim for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]."") (quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[2]

Relying on *Freytag* v. *Commissioner*, 111 S. Ct. 2631 (1991), petitioner asks this Court to forgive his waiver.

> Failure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

[2] The Court of Military Appeals did not grant review on this question. Accordingly, it is not clear that this question is subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) and 10 U.S.C. 867(h)(1), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right to limit its decision in any case to less than all the issues urged by the accused. 10 U.S.C. 867(d). Since petitioner did not raise this issue for review by the Court of Military Appeals, there is a question whether that court rendered a "[d]ecision" on the issue that petitioner presents in his petition. For the reasons given in the text, however, it is unnecessary to answer that question in this case, since the question presented in the certiorari petition does not warrant review by this Court in any event.

Freytag involved an Appointments Clause challenge to the selection of special trial judges by the chief judge of the Tax Court, a challenge that the petitioners had not raised in that court. This Court said that it had the power to excuse the petitioners' waiver, and found *Freytag* to be "one of those rare cases in which we should exercise our discretion to hear petitioners' challenge" despite their failure to assert it in the courts below. 111 S. Ct. at 2639. Petitioner urges the Court to follow the same approach in this case.

Freytag, however, did not involve a rule of procedure, like Rule for Courts-Martial 905(e), requiring a defendant to raise a claim in a timely manner on pain of forfeiture. That difference is material. For the past two decades, this Court has consistently declined to review defendants' claims that have not been properly preserved under the rules of trial and appellate procedure unless the defendant can establish both "cause" and "actual prejudice" for his default. See, *e.g.*, *Davis* v. *United States*, 411 U.S. 233 (1973); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Murray* v. *Carrier*, 477 U.S. 478 (1986). Petitioner has made no effort to satisfy that test. In any event, petitioner has not explained why the question presented in this case is of such imperative public importance that this Court should deviate from its firmly settled practice of declining to serve as a nisi prius court. Finally, the Court of Military Appeals has recently granted discretionary review to resolve this question. See *United States* v. *Weiss*, No. 67869/MC (C.M.A. June 16, 1992). Once that court has spoken on the matter, there will be ample time to address the question presented by this petition.

Second, there is no conflict among the circuits on the question presented by the petition. Only two appellate courts have spoken on this subject; both courts are intermediate appellate courts in the military justice sys-

tem; and both courts rejected an Appointments Clause challenge to the composition of the courts of military review. See *United States* v. *Prive*, No. 984 (C.G.C.M.R. July 6, 1992); *United States* v. *Coffman*, No. 92-1030 (N.M.C.M.R. June 3, 1992).

Third, petitioner's claim lacks merit. The Appointments Clause, Art. II, § 2, Cl. 2,[3] provides that only the President (with the advice and consent of the Senate) may appoint "Officers of the United States." By contrast, Congress can vest the power to appoint "inferior Officers" "in the President alone, in the Courts of Law, or in the Heads of Departments." In petitioner's view, military trial judges are "inferior Officers," but the Judge Advocates General are neither "Courts of Law" nor "the Heads of Departments" and therefore cannot appoint military trial judges. The short answer to petitioner's argument is that because the trial judge in his case, like every other judge who presides over a general or a special court-martial, was an officer of the United States appointed by the President and confirmed by the Senate, an additional appointment pursuant to the Appointments Clause is unnecessary.

Military trial judges are part of a comprehensive system of military justice established by the Uniform Code of Military Justice. The Judge Advocates General of the

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[3] The Appointments Clause, Art. II, § 2, Cl. 2, provides as follows:

> He [the President] * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

services are primarily responsible for implementing the UCMJ.[4] In carrying out that obligation, the Judge Advocates General detail commissioned military officers to serve at almost every level of the military justice system.[5] Consistent with that scheme, Article 26(b) of the UCMJ, 10 U.S.C. 826(b), provides as follows:

> A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

The military trial judge in petitioner's case was a commissioned officer. Furthermore, each commissioned officer in the Navy and Marine Corps is appointed, at least originally, by the President with the advice and consent

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[4] The Judge Advocates General are defined as "the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of Transportation." 10 U.S.C. 801(1).

[5] See, *e.g.*, 10 U.S.C. 801(13) (specifying that all "judge advocate[s]" must be military "officer[s]" serving in the various Judge Advocate General corps or other military "officer[s]" designated as "judge advocate[s]" or "law specialist[s]"), 826 (requiring the Judge Advocates General to certify and detail "commissioned officer[s] of the armed forces" to serve as military trial judges), 827(b) (specifying that prosecution and defense counsel who are detailed to practice before courts-martial must be judge advocates, who are, by definition, commissioned military officers), 870 (providing that the Judge Advocate General shall "detail * * * commissioned officers" to serve as appellate counsel before the Courts of Military Review and the Court of Military Appeals).

of the Senate.[6] As a commissioned officer, a military trial judge may be assigned to nonjudicial duties by the Judge Advocate General, as he deems it necessary to meet the needs of the service. Under these circumstances, there is no merit to petitioner's Appointments Clause argument, because it is well settled that Congress may modify existing duties or specify additional germane duties to be performed by an officer of the United States without thereby making it necessary for the incumbent again to be nominated, confirmed, and appointed pursuant to the Appointments Clause. See *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893).

In *Shoemaker*, the complainants challenged a statute establishing a commission to oversee the development of Rock Creek Park. 147 U.S. at 284. Three commission members were appointed by the President with the advice and consent of the Senate, but two military officers (the Chief of Engineers of the United States Army and the Engineer Commissioner of the District of Columbia) also were designated to serve on the commission. *Ibid.* Their presence was challenged on the ground that they had not been nominated to and confirmed for their new position. The Court rejected that claim, explaining that, *id.* at 301:

> [T]he two persons whose eligibility is questioned were at the time of the passage of the act * * * officers of the United States who had been theretofore appointed by the President and confirmed by the Sen-

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[6] See 10 U.S.C. 531(a) ("Original appointments [of Regular Navy and Marine Corps officers] * * * shall be made by the President, by and with the advice and consent of the Senate."), 593 (requiring Presidential appointment and Senate confirmation of military reserve officers), 624 (governing promotions of regular military officers), 5912 (governing appointments and promotions of reserve officers).

> ate[.] [W]e do not think that, because additional duties, germane to the offices already held [were added by Congress], it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

The Court ultimately held that "the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties." *Ibid.*; see also *Williams* v. *Mercer*, 783 F.2d 1488, 1515 (11th Cir.) (holding that members of the Investigating Committee of the Judicial Council of the Eleventh Circuit "were not 'appointed' by the chief judge within the meaning of the Appointments Clause * * * but rather [were] sitting federal judges already appointed by the President * * * [whose] service on [the Investigating Committee was] merely an outgrowth of their existing responsibilities"; citing *Shoemaker* for the proposition that "a statutory expansion of the functions of an existing position does not create a new office requiring re-appointment"), cert. denied, 477 U.S. 904 (1986).

Under that analysis, the assignment of any Navy or Marine Corps officer to serve a tour of duty as a military trial judge is entirely consistent with the Appointments Clause. All military officers are responsible for seeing to the discipline of the members in their command and are trained to enforce the civil and military law. Under the Uniform Code of Military Justice, commissioned officers have a special duty "to quell quarrels, frays, and disorders among persons subject to [the Code] and to apprehend persons subject to [the Code] who take part therein." Art. 7(c), UCMJ, 10 U.S.C. 807(c). Every

commanding officer is further authorized to impose certain "non-judicial punishment[s]," including arrest in quarters for no more than 30 consecutive days, instead of instituting court-martial proceedings. Art. 15, UCMJ, 10 U.S.C. 815. Every officer who convenes a general or a special court-martial assumes certain quasi-judicial duties in reviewing the sentences of those courts-martial he convenes. Art. 60, UCMJ, 10 U.S.C. 860. Finally, any commissioned officer may serve as a military trial judge if he possesses the requisite qualifications for performance of that function. Given the nature of the responsibilities inherent on becoming an officer within the armed services, the duties of a military trial judge are germane to the duties of a military officer.[7] Petitioner's

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[7] Article 26 of the UCMJ, 10 U.S.C. 826, provides in part that "a military judge *shall* be detailed to each general courts martial" (emphasis added). Although the United States Navy has elected to follow the procedures set forth under that provision for special courts-martial as well, the UCMJ provides that a special court-martial may be composed of either a military judge or a board of at least three members. Art. 16, UCMJ, 10 U.S.C. 816. Any commissioned officer on active duty is qualified to serve as a member on all courts-martial. Art. 25(a), UCMJ, 10 U.S.C. 825(a). In the absence of a military judge, it is the panel of members who are tasked with adjudicating those issues that would otherwise be handled by the military trial judge. Art. 51, UCMJ, 10 U.S.C. 851. Furthermore, a summary court-martial is composed of one commissioned officer, who need not possess the qualifications of a military judge. Art. 16(3), UCMJ, 10 U.S.C. 816(3). Thus, not only does the Code anticipate that any qualified commissioned officer may perform the functions of a military judge at some point in his military career, it also anticipates that any commissioned officer, even an officer lacking the qualifications of a military judge, may at some point be called on to sit in at a court-martial and perform a judicial function. The structure of the Code in this respect provides additional authority for the proposition that the duties of a military trial judge fall within the general duties of an officer in the armed forces.

challenge to the qualifications of the military trial judge in his case therefore lacks merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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